vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.547 OF 2003

1. Parshuram Kashinath Chavan & Anr. ... Appellants

V/s.

The State of Maharashtra ... Respondent

a/w

CRIMINAL APPEAL NO.548 OF 2003

Ajay Janardhan Chavan ... Appellant

V/s.

The State of Maharashtra ... Respondent

Mr.S.A. Ingawale for Appellants
Mr.P.S. Hingorani, APP, for Respondent-State

CORAM: **D.G. DESHPANDE &**
SMT.NISHITA MHATRE, JJ.

JUDGEMENT RESERVED ON: **MARCH 21, 2007**
JUDGEMENT PRONOUNCED ON: **MARCH 29, 2007**

JUDGMENT (PER SMT.MHATRE, J.):

. Both these appeals have been heard together since they impugn the judgment in Sessions Case No.71 of 2002 decided by II Adhoc Additional Sessions Judge, Kolhapur. The Appellants Nos.1 and 2 in Criminal Appeal No.547 were accused Nos.1 and 2 before the Sessions Court. All the accused have been convicted for the offence punishable under section 302 r/w 34 of IPC. They are also convicted for the offence punishable under section 364 of IPC. They have been sentenced to suffer imprisonment for life and payment of fine on each count.

2. The case of the prosecution is that accused No.1 suspected that his wife had an illicit relationship with one Deepak More, who was a cable operator in their locality. At about 11.30am on 15.11.2001, a lady telephoned at the Mores' residence and asked for Deepak. She disclosed that she wanted a cable connection. Shamrao, Deepak's father informed her that Deepak had left the house and would return only in the afternoon for lunch and that she should call at about 2 pm. Accordingly, Deepak received a telephone call at about 2 pm and informed the caller that he and his assistant Vishal would reach near the hospital of Dr.Varute at about 4 pm and that the telephone caller should meet them thereafter. Deepak then left informing his father that he was going to the residence of the lady for providing her a cable connection for her television. At about 4 pm, the lady called again when Shamrao informed her that Deepak had already left for her house. At about 6.30pm, Vishal, Deepak's assistant returned to Deepak's house when Shamrao asked about the whereabouts of Deepak. According to the prosecution, Vishal informed Shamrao that accused No.1 had taken Deepak in a white Maruti car from a spot outside Dr.Varute's hospital. Accused Nos.2 and 3 were also in that car, besides another person unknown to Vishal. Shamrao received a telephone call at about 7.30 pm from his daughter informing him that a person named Chavan had informed her on the telephone that Deepak had met with

an accident and was admitted in a hospital at Gandhinagar. Shamrao, Vishal and two others reached the hospital when they were informed that he had been admitted to another hospital for treatment. They found him lying on a stretcher waiting to be X-rayed. Deepak disclosed to Shamrao, in the presence of the persons accompanying him that the accused had taken him in a Maruti car to the Hatkangale hill. Deepak told his father that the accused and one other person unknown to him had assaulted him with cricket stumps. According to the victim, while being beaten, accused No.1 kept asking for the whereabouts of his wife, Vaishali. An FIR was lodged by Shamrao. He was advised by the Doctors to shift Deepak to a another hospital as the facilities required for treatment were unavailable in that hospital. Accordingly, Deepak was shifted to another hospital. On the basis of the FIR lodged with the police station on 16.11.2001, a crime was registered under section 326 r/w 34 of the IPC. It appears that Deepak then succumbed to his injuries at 8 am on 16.10.2001. The accused were apprehended on 17.11.2001. They were charged for having murdered Deepak More. Their trial was committed to Sessions Court, Kolhapur. They have been convicted and sentenced as aforesaid.

3. The case of the prosecution is based entirely on circumstantial evidence. The circumstances on which the prosecution has relied on are: (i) the wife of accused

No.1 and the victim were well acquainted and they had met on an earlier occasion in a lodge; (ii) the accused suspected that illicit relations existed between the victim and his wife; (iii) a telephone call was received by Deepak More from a woman and he had proceeded to Dr.Varute's hospital as directed by the telephone caller; (iv) the victim was abducted by the accused in the presence of Vishal and; (v) Deepak had made an oral dying declaration to his father in the presence of Vishal and two other persons that it was the accused who had assaulted him, all the while asking for the whereabouts of the wife of accused No.1, Vaishali.

4. In order to prove its case, the prosecution has examined 32 witnesses. Shamrao, the complainant, is PW1. This witness has spoken about the telephone calls received and the caller who was a lady asking for Deepak, the victim. He has also spoken about Vishal and Deepak leaving at about 4 pm for providing a cable connection to the lady who had called. He has then mentioned that Vishal returned to his house at 6.30 pm. When he asked Vishal where Deepak was, Vishal informed him that the accused and one other person unknown to him, had taken him in a Maruti car which was parked near Dr.Varute's hospital. He then speaks about the receipt of the telephone call from his daughter informing him about Deepak's accident. He has stated that when he reached the hospital at Gandhinagar, Deepak told him

that his injuries were not due to an accident but that the accused and one person unknown to him had abducted him and had driven him away in a Maruti car owned by accused No.1. The victim informed him that the accused and the other person whom he did not know had beaten him with stumps. While doing so, accused No.1 kept enquiring about the whereabouts of Vaishali, his wife. This witness has stood his ground while being cross-examined. There are no contradictions or discrepancies in his evidence. However, he has stated in the cross-examination that accused No.1 often quarrelled with his wife, Vaishali after he got married to another woman. He has explained that when Vishal returned home and informed him that Deepak had been taken in a Maruti car by the accused, he did not think anything was amiss because accused No.1 was known to him. It was only when his daughter phoned informing him that Deepak had met with an accident that he was alarmed.

5. PW10, Vaishali, is the wife of accused No.1. She has denied having any acquaintance with Accused Nos.2 and 3. She has stated that one Vaishali Shinde was working in the office of Chavan Motors which was run by her husband as a telephone operator. She has admitted her acquaintance with the victim who stayed in the same lane as her. She has also admitted that accused No.1 often quarrelled with her because he

suspected she had illicit relations with Deepak, the victim. She has stated in her deposition that on 2.11.2001, when she quarrelled with her husband, Deepak had asked her to meet him in a lodge. She then claims that she and her daughter Supriya, her neighbour Mitali went to meet Deepak in the lodge where they hired a room. According to this witness her daughter Supriya disclosed to accused No.1 that she had met Deepak in the lodge due to which he was enraged. She claims that Deepak then advised her to stay with his girlfriend till she could calm down. According to this witness, she stayed there for eight days. The cross-examination has not elicited any admissions which are contrary to what has been stated in the examination in chief. She has admitted that after she returned from the lodge with the two girls, accused No.1 had gone to Deepak's house and picked up a quarrel with him.

6. The next important witness from the point of view of the prosecution is Vishal, who had last seen Deepak and the accused together. This witness has spoken about the quarrels between PW10 and the accused because of his second marriage. He has then corroborated the testimony of Shamrao, PW9, that he and Deepak had left together for providing a cable connection to a resident in a colony opposite Dr.Varute's hospital. According to this witness, they left on the victim's scooter. When they reached near

the hospital he went into the colony asking for a person named Patil or Shinde, which were the names given by the telephone caller. He was informed that there was no such person residing in the colony. The victim remained standing near the scooter. The witness then states that he saw a white Maruti car approach Deepak and come to a halt near him. The witness by that time had reached where Deepak was standing. According to him, accused Nos.2 and 3 placed their hands on the victim's shoulders and made him sit on the back seat of the Maruti car. The witness stated that accused No.1 was driving and another person who he could not identify was seated next to him. This witness was asked to leave by accused No.1 as he had some work with the victim. The witness then saw accused No.1 reversing the Maruti car and proceeding together with the other accused, another person and the victim along the same road as they had approached Deepak. According to the witness, he returned to Deepak's house on the scooter after doing some banking work. This witness claims that he learnt of Deepak's accident from his mother when he was at a tea stall with his friends. He was present at the hospital when Deepak disclosed to his father that it was accused No.1 who had assaulted him with stumps, all the while asking about the whereabouts of Vaishali, PW10. Thus, on all material facts PW13 has corroborated the testimony of PW9.

7. The Doctor, who has been examined as PW24, has stated that on 15.11.2001, 4 persons brought the victim to the hospital in an injured and semi conscious condition. One of the persons gave him a visiting card. The visiting card belonged to accused No.1. The Doctor states that he had directed his receptionist to note down the names of the persons who brought the victim to the hospital. According to him, the victim was brought to the hospital in a white Maruti car and the receptionist had noted the number of the car. He has described the injuries sustained by the victim. According to the witness after some treatment was administered to the victim, his blood pressure became normal at about 7.30 pm. His condition started deteriorating after 8.45 pm. The witness states that the victim's relative reached the hospital 45 minutes after he was admitted there. He had advised the relatives to shift the victim to another hospital. By this time, according to the witness two persons who admitted the victim to the hospital had already left. The witness has stated that the patient was not in a position to have a statement recorded. He admitted that he had only seen accused No.1 who had given him his visiting card and not the other accused. Although the witness has stated that the statement of the victim could not be recorded, there is nothing on record or no admission has been elicited from him that it was not possible for the victim to make an oral dying

declaration to his father, once his condition improved.

8. The receptionist has been examined as PW25. She has stated that she noted the registration number of the Maruti car on a piece of paper which has been exhibited as Exhibit 98. She has stated that the other writing on the paper is that of accused No.1 where he had written his phone number and address below his name. According to this witness, she noted the names and addresses of the other persons with him.

9. Thus, the prosecution has proved through the testimony of these and other witnesses that the victim met with a homicidal death. The prosecution has also proved that the victim was last seen together with the accused. There is evidence on record to show the animosity that accused No.1 had towards the victim because he suspected that his wife Vaishali had an illicit relationship with the victim. There is also evidence on record to establish that Vaishali had met the victim in a lodge on a few days earlier which had angered accused No.1. It has also been proved that while the victim was being assaulted by the accused, accused No.1 kept questioning him about the whereabouts of Vaishali. It has been established that Vaishali was not staying with accused No.1 at that point of time. There is evidence to prove that accused Nos.2 and 3 had accompanied accused No.1 in the Maruti car. It was they

who had bundled the victim into the car. They were present alongwith accused No.1 when the victim was admitted to the hospital run by PW24. All the accused had furnished their names and addresses to the receptionist, PW25. She had noted the number of the Maruti car which belonged to accused No.1.

10. The prosecution has examined several other witnesses in order to prove its case.

PW1, PW2, PW3, PW11, PW12 and PW27 are the panch witnesses. PW1 has proved the spot panchanama. PW2 and PW12 have deposed about the seizure of the clothes of the deceased and the accused respectively. PW3 has witnessed the seizure of the white Maruti car and the two wooden bales. PW11 has spoken about the discovery of the stumps at the instance of accused No.1. PW27 has proved the arrest panchanama.

PW4 is the telephone operator employed in the office of accused No.1. PW17 is the shopkeeper from whose shop, according to the prosecution, the stumps used to assault the victim were purchased. PW18 is a friend of accused No.1. PW5 is the business partner of accused No.1. All these witnesses have been declared hostile and therefore, their testimonies are of no consequences for the prosecution.

PW14 is the neighbour of the deceased who had informed his father about the telephone call received at her house for the victim.

PW16 is the medical offier who conducted the postmortem examination on the dead body of the victim.

PW22 is the person who has drawn the map on the spot of the incident.

PW23 is the Neuro Surgeon who examined the victim after he was initially treated at the hospital belonging to PW24.

PW26 is the Manager of the Beer Bar where the accused were found and later arrested. He has stated that the accused were present in the Beer Bar when he came on duty at about 6 pm on 16.11.2001. According to him, the accused arrived at the beer bar in a white Maruti car. He has identified the four accused.

PW29 is the agent who was engaged in purchase and sale of old vehicles. According to him, accused No.1 was doing the same business and in October 2001, accused No.1 informed him that he wished to purchase a Maruti car. This witness claims to have then managed to sell a white Maruti car to him which belonged to one of his

clients.

PW28, PW30, PW31 and PW32 are all the police officers who have been involved in the investigation of the crime.

11. All these circumstances, in our opinion, form a chain which leads to the only hypothesis that the accused are guilty of the offence of culpable homicide. The learned Advocate for the accused-appellants argued that the offence committed by the accused cannot in any event amount to murder. According to him, at best, it could be said that accused No.1 had committed culpable homicide not amounting to murder. The learned advocate points out that none of the accused had any intention to kill the victim. He submits that the very fact that the accused had admitted the victim to the hospital demonstrates that the intention of the accused was not to kill the deceased but to ascertain the whereabouts of Vaishali, the wife of accused No.1. The learned advocate relies on the judgments of the Supreme Court in the case of *Joseph v/s. State of Kerala,* **AIR 1994 SC 34** and *Khuman Singh & Ors. v/s. State of Madhya Pradesh*, **AIR 2005 SC 1281** to buttress his submissions. He then urges that accused Nos.2 and 3 ought to be acquitted as the only role attributed to them is that they forced the victim into the Maruti car.

12. The learned Assistant Public Prosecutor submits that the three accused are equally guilty. According to him, the victim has been mercilessly assaulted by all the accused with stumps as reflected from the oral dying declaration made by the victim. He submits that the stumps have been recovered from the scene of offence. The type of injuries sustained by the victim also indicated the severity with which the victim was beaten. Apart from this, the clothes of the accused which were recovered were also blood stained. He submits that the act of the accused was obviously premeditated as they had abducted the victim and then assaulted him.

13. In our opinion, the submissions of the learned Advocate for the appellant must be accepted. It is obvious from the evidence on record that the accused had no intention to kill the victim although they had the knowledge that the assault could lead to his death. Their lack of intention to kill him is apparent from the fact that after assaulting him, they had admitted him to hospital for treatment. Accused No.1 had also given his visiting card to the Doctor, i.e., PW24. Therefore, the Sessions Court was not correct in holding that the accused were guilty of the offence punishable under section 302 r/w section 34 of the IPC. We are therefore of the opinion that the offence committed by the accused is that of culpable homicide not amounting to murder.

14. We, however, do not accept the submissions of the learned advocate for the appellant that accused Nos.2 and 3 should be acquitted. This is because it was accused Nos.2 and 3 who had bundled the victim into the Maruti car which was driven by accused No.1. According to the oral dying declaration made by the victim to his father, all the accused had beaten him while accused No.1 questioned him about Vaishali's whereabouts. In such circumstances, we find accused Nos.2 and 3 are equally guilty and hence all the accused are convicted under section 304 part II r/w 34 of the Indian Penal Code and sentenced to suffer R.I. for 10 years. However, the conviction under section 364 will have to be set aside as we have already held that the accused had no intention to murder the victim and is hereby set aside. Appeal stands disposed of accordingly.

(D.G. DESHPANDE, J.)

(SMT.NISHITA MHATRE, J.)